Supreme Court, U.S.
FILED

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No. 05-

In the

Supreme Court of the United States

MARIA FANNY RODRIGUEZ-REALPE

Petitioner,

vs.

ALBERTO R. GONZALES,
Attorney General of the United States

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

EPHRAIM TAHIR MELLA, ESQUIRE
Counsel of Record
1814 Callowhill Street, First Floor
Philadelphia, Pennsylvania, 19130
(215) 640-9770

Counsel for Petitioner, Rodriguez-Realpe

QUESTIONS PRESENTED FOR REVIEW

I. After Petitioner established past persecution, neither the Immigration Judge nor the Board properly applied the regulatory presumption of a well-founded fear of persecution.

II. The Third Circuit should have remanded Petitioner's case to the Board, as the Agency never addressed whether Petitioner has demonstrated compelling reasons for being unwilling to return to Colombia arising out of the severity of the past persecution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit was entered on December 16, 2004, under the caption Rodriguez-Realpe v. Ashcroft, No. 03-4712 (3rd Cir. 2004)(unpublished). The judgment is attached hereto as Appendix "B". Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on February 10, 2005. The Order is attached hereto as Appendix "A".

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 16, 2004. The Third Circuit Court of Appeals had jurisdiction over this matter under INA §242(a)(b), 8 U.S.C. §1252 (a)(b), as there had been a final adjudication on the merits by the Board of Immigration Appeals on November 13, 2003.

The Petition for Writ of Certiorari has been filed within the reglementary period prescribed by law, which is on May 6, 2005, reckoned from ninety (90) days from the date of the decision of the Third Circuit Court of Appeals on February 10, 2005, denying Petitioner's Petition for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISION INVOLVED

8 U.S.C. § 208.13(b)(1)(i)(1999):

> "If it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return."

8 C.F.R. § 208.13 (b)(1)(ii)(1999):

> "An application for asylum shall be denied if the applicant establishes past persecution under this paragraph but is also determined that he or she does not have a well-founded fear under paragraph (b)(2) of this section, unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence arising out of the severity of the past persecution."

REASONS FOR GRANTING THE WRIT

1. The instant appeal involves the failure of the Board to properly apply the regulatory presumption of a well-founded fear of future persecution when Petitioner established past persecution. An asylum applicant who establishes past persecution is entitled to a presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1)(i)(1999). The presumption can be overcome if the Government establishes by a preponderance of the evidence that country conditions have changed to such an extent that the applicant no longer has a well-founded fear of future persecution. Id.

In the instant case, at the very least, there is significant doubt whether the Board or Immigration Court gave Petitioner the benefit of the presumption where it was found that Petitioner established past persecution. The Immigration Judge never states in her decision that the Government established by a preponderance of the evidence that the presumption had been overcome due to changed country conditions. Additionally, the Board never even addressed the presumption. Failure to apply the presumption constitutes reversible error. Thus, the Third Circuit should have remanded the case to the Board to give the Agency an opportunity to address the presumption in the first instance.

2. Petitioner also contends that the instant Petition should be granted as the Third Circuit's decision conflicts with its own prior decisions.

3. The Petition should also be granted because the Third Circuit did not remand Petitioner's case where neither the Immigration Judge nor the Board addressed whether Petitioner had demonstrated compelling reasons for being unwilling to return to Colombia. Where an asylum applicant establishes past persecution, as she did here, and the Government rebuts the presumption of a well-founded fear of persecution, the asylum application should be denied unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to her country of nationality arising out of the severity of past persecution. 8 C.F.R. § 208.13 (b)(1)(ii)(1999).

Under the regulations, this issue must be addressed prior to denying an asylum application in any case where an applicant establishes past persecution. Since the IJ and Board failed altogether to address this issue, the Third Circuit should have remanded the case to the Agency to allow for a determination of whether Petitioner established compelling reasons for being unwilling to return to Colombia arising out of the severity of her past persecution.

The Third Circuit's decision contains significant legal errors. It is also inconsistent with its own case law on the same issue presented in the instant case. The case is of extreme importance, especially when considering that legal errors in asylum cases may result in deportation to a country

where applicants legitimately fear for their safety, as in the instant case. Accordingly, Petitioner respectfully requests that the Court grant her writ of certiorari.

STATEMENT OF THE CASE AND FACTS

Shorn of its non-essentials, the following summary of facts may be stated thus –

Petitioner is a forty-four (44) year old female, native and citizen of Colombia, who entered the United States on a B-2 visa on March 11, 2000. Prior to entering the United States, Respondent resided in the city of Cali, Colombia, where she owned a vegetarian restaurant.

Petitioner testified that she joined the Conservative Party in Colombia prior to the elections of 1998; that she utilized her occupation as the owner of a vegetarian restaurant in order to further the campaign of the Conservative Party; that she did this by visiting the farmers and workers in her area in order to address their nutritional problems; that she would organize food preparation and eating courses so they could utilize their own crops.

Petitioner further testified that she worked closely with the Dr. Daria Arisa Landonio, who was campaigning to be a member of the Chamber of Representatives; that she met Dr. Arisa during the year 1997, prior to the elections of 1998; that Dr. Arisa was responsible for the courses that

petitioner presented to the constituents of the area; that at the conclusion of the food courses, petitioner would inform the farmers that it was necessary to support Dr. Arisa in the elections so that he could continue to collaborate with petitioner to promote the nutrition program in the chamber of representatives ; that her specific duty, as narrated to the Immigration Court on June 12, 2002, was -

> "To influence permanent control over our programs with the farmers. My responsibility was to verify the needs of each region and group of farmers, develop budgets that would be approved by the government, submit in writing to the running delegate and he in turn, would present to the government the allocation of the budget and designation of the public official that should verify and execute the project."

That Dr. Arisa aspired to secure as much as 30,000 votes within the region with petitioner's help; that Dr. Arisa was, in fact, elected to be a substitute to the first deputy, with the intention of developing water, electricity and machinery for the country; that petitioner at the end of 1998, she began receiving threatening telephone calls; that said calls were coming from an individual who called himself as Ricardo Gonzalez, who belonged to group No. 32 of the FARC; that petitioner would receive threatening phone calls where she worked and where she delivered her nutrition speeches; that petitioner was told by this individual that, "I was a danger for them, because according to them, I was collaborating with the Doctor Arisa, and they're enemies to the political groups."; that she was

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threatened and told that she had to leave; that she was threatened with her life.

Moreover, petitioner testified in chief, which is reproduced *en toto*, thus -

> "In the beginning I ignored their threats considering my work one of social character but the collaboration with the political group of Dr. Arisa considered the 'Guerilleros' sufficient motive to include me in the list of every armed group....Dr. Arisa...offered me protection through the public forces but the danger to my life was too great and imminent."

Petitioner furthermore testified that she decided to sell her business; that she confided with her husband and her co-workers that she was frightened, and the easiest thing for her to do would be to flee the country; that petitioner sold her business and fled Colombia in 2000; that she did not sell her business and leave Colombia until 2000 because she had tried to find a solution to her problem, but she was unsuccessful; that she fears for her life if she is forced to return to Colombia because the FARC dominates the whole country; that the Immigration Court found petitioner to have testified credibly. (IJ Dec. p. 3, APPENDIX "D").

On August 16, 2002, the Immigration Judge rendered a decision, the dispositive portion of which reads thus -

"In other words, again, although this Court has tremendous respect for the wonderful and dignified work that the respondent did to teach people how to live and how to feed themselves, there are many legal problems with her claim. Although she easily establishes and the Court can easily find that FARC is an organization that the government of Colombia is unable or unwilling to control, and although the Court can easily find that the respondent did express her political opinion even in public in support of the Conservative Party, the favorable aspects of her case end there. She tolerated calls, as the Court has emphasized many times above, for more than a year and what sounds like years, from late 1998 until March 2000, without any alteration at all to her lifestyle. She was offered protection by Doctor Arisa, but declined it evidently because she did not feel in danger. She never went to the police. And then on top of all of that, the respondent slowly, slowly, deliberately sold her business, came to the United States, and then had her family come later. That very slow, deliberate, very calculated sale of her business, is in the opinion of this Court, the death knell to the claim because obviously it shows that the respondent had no great fear and took her time to sell the business. The Court merely concludes that, given the leisurely way in which the respondent eventually sold her business, she obviously waited until she could work the very best deal possible, the Court assumes, because it certainly took her long enough (Id, p.3,).

"Therefore, this Court finds that, frankly, the respondent presents little, if any, evidence that there exists a clear likelihood of persecution should she return even to where she was living in Colombia, much less should she locate to some other part of the country. The Court further finds, as a matter of law, that the application for withholding of removal pursuant to Section 241 (b)(3)(A) of the Immigration and Nationality Act must be denied. (Id, p.5)

Petitioner timely filed an appeal to the Board of Immigration Appeals. On November 13, 2003, the Board of Immigration Appeals dismissed Petitioner's appeal, by virtue of an Affirmance Without Opinion (AWO). Petitioner filed a timely Petition for Review with the Third Circuit Court of Appeals.(BIA Decision, APPENDIX "C")

On December 16. 2004, the Third Circuit Court of Appeals dismissed Petitioner's Petition for Review, holding as follows, thus -

"We will affirm the BIA decision because the record does not reveal a "clear probability" of future persecution based on the 1998-1999 telephone calls. First, the IJ reasonably concluded that the petitioner "tolerate[d] the calls for years" while she was in Colombia (App.7). She never contacted the police, changed her telephone number, disconnected her phone, and she did not accept the protection offered to her by Dr. Arisa (R.99.) Second, the caller never

> followed through with the threats. Rodriguez-Realpe maintained her Cali, Colombia residence and vegetarian restaurant for over one year after the phone calls ended, but "[n]o one came to [her] home, no one came to her lectures, no one seems to have altered any of [her] property, no one seems to have threatened [her] in person, no one seems to have taken any action against [her] family, and no one seems to have followed [her] around." (App.6.) She never tried to relocate within Colombia. Instead, she sold her restaurant one month before she left the country for the United States in 2000, to be joined there by her husband and children two months later." (3rd Cir. Opinion, p.3, APPENDIX "B").

Petitioner subsequently filed a timely Petition for Rehearing arguing that the Immigration Court failed to take notice of the "country reports" in Colombia, which evince the fact that the FARC is really a pervasive and notorious group, involved in summary killings and disappearances of persons. On February 10, 2005, the Petition for Rehearing was denied (APPENDIX "A").

ARGUMENT

1. After Petitioner established past persecution, neither the Immigration Judge nor the Board properly applied the regulatory presumption of a well-founded fear of persecution.

The substantial evidence standard requires petitioner "to do more than simply offer a 'plausible' alternative theory; instead he must demonstrate that a reasonable fact-finder would be compelled to credit his testimony" See *Chen v. INS*, _F.3d_ (2nd Cir. Sept. 19, 2003).

Petitioner's testimony, either oral or written, supports a conclusion that will undoubtedly compel a reasonable fact-finder to favor petitioner's request for the reliefs of withholding of removal and Convention Against Torture.

Firstly, there is no dispute that the telephone calls received by petitioner were actually death threats, which were perpetrated by a rebel group member, who belongs to the notorious group called FARC, which operates in the entire country of Colombia. As far as petitioner was concerned, she feared said threats against her person, because of her perceived collaboration with Dr. Arisa, a political candidate who was running under the Conservative Party, which became the main target of the rebel group. In the case of *Garovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998), the Hon. Court therein held that "if credible, three death threat letters would appear to constitute persecution."

At this juncture, it must be worthy to note that, the immigration court failed to take notice of the "country reports" in Colombia, which evince the fact that the FARC is really a pervasive and notorious group, involved in summary killings and disappearances of persons.

Moreover, the immigration court did not assail petitioner's credibility when it hinted thus -

> "Her credible testimony is that in 1998, she had already been working hard to teach both cooking and also nutrition to people who were farming certain crops in Colombia where she lived. In fact, the respondent owned her own business and had three employees living apparently near Cali." (NT, p.3, 8/16/02)

Secondly, contrary to the IJ's finding, petitioner sold her restaurant business for fear that her life would be in danger were she to stay longer in Colombia. As earlier stated, the FARC is a militant group opposed to the government, having its reach throughout the whole country, in terms of its supporters, and base operations. Petitioner, on the other hand, has been targeted as leaning toward the Conservative Party, of which she is an avid supporter of Dr. Arisa, and her efforts to alleviate the economic conditions of the masses through her nutritional classes gave vent to the ire of the rebel group. Even assuming, *arguendo*, that subject death threats did not result in physical, mental or emotional harm against petitioner, still the same are relevant to a determination of the well-foundedness of an applicant's fear of future persecution. See *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (harassment and inability to get a job not past persecution, but relevant to establishing a well-founded fear); see also *Damaize-Job v.*

INS, 787 F.2d 1332 (9th Cir. 1986)(no need to demonstrate countrywide persecution if persecutor shows no intent to limit his persecution to one area, and applicant can be readily identified); *cf. Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986)(danger based on anonymous threat localized in a small geographic area).

Recently amended asylum regulations provide that the reasonableness of internal relocation should be based on considerations including, "whether the applicant would in fact suffer other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties." See 8 C.F.R. § 1208.13(b)(3)(2002).

Further, the IJ made issue of the fact that petitioner's continued presence in her country, and calculated sale of her business, spelled the "death knell" of petitioner's claim. Contrary to this ruling, however, an "applicant's continued presence in her country of persecution before flight, while relevant, does not necessarily undermine a well-founded fear". See e.g., *Lim v. INS*, 224 F.3d 929, 935 (9th cir. 2000)(post-threat harmless period did not undermine well-founded fear). There is no "rule that if the departure was a considerable time after the first threat, then the fear was not genuine or well founded." *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996).

Finally, the IJ never actually gave Petitioner the benefit of the presumption in the case. The IJ concluded that "given the leisurely way in which the respondent eventually sold her business, she obviously waited until she could work the very best deal possible, Petitioner would not have a well-founded fear of persecution if she returned to Colombia. The IJ never stated that the Government established by a preponderance of the evidence that the presumption had been overcome by changed country conditions or that preponderance of the evidence was the appropriate standard. Obviously, the IJ held Petitioner to the standard that applies to asylum cases where an applicant has not established past persecution and must establish a well-founded fear of persecution without the benefit of the regulatory presumption.

The BIA's decision in the instant case did not even address the regulatory presumption. The BIA merely issued an AWO, without finding that Petitioner does not have a well-founded fear of future persecution.

In the instant case, there is at the very least, significant doubt as to whether the BIA and the IJ applied the presumption set forth in 8 C.F.R. § 208.13(B)(1)(i)(1999). It does not appear from the decisions that they did apply the presumption set forth in the regulations, which constitutes reversible error. Accordingly, the case should be remanded to allow the BIA to specifically address the regulatory presumption and the issue of changed country conditions in Colombia as they apply to Petitioner's case.

2. The Third Circuit should have remanded Petitioner's case to the Board, as the Agency never addressed whether Petitioner has demonstrated compelling reasons for being unwilling to return to Colombia arising out of the severity of the past persecution.

Petitioner contends that the Third Circuit should have remanded the case to the BIA because the Agency never determined whether she has demonstrated compelling reasons for being unwilling to return to her country of nationality arising out of the severity of past persecution. 8 C.F.R. 208.13 (b)(1)(ii)(1999).

Petitioner contends that the regulations require an Immigration Judge to address the humanitarian ground for asylum arising out of past persecution if the judge finds the presumption of a well-founded fear has been rebutted. Although Petitioner did not specifically address this regulation in arguing she was entitled to asylum before the Third Circuit, the Third Circuit should have still address the issue because the Immigration Judge and BIA were required to analyze Petitioner's asylum claim under C.F.R. 208.13 (b)(1)(ii)(1999) since she established past persecution.

In the instant case, the IJ never specifically addressed whether Petitioner's instances of past persecution alone would warrant a grant of asylum on humanitarian grounds.

Absent an explanation by the IJ, a reviewing court has no idea if or why the judge decided against a humanitarian grant of asylum. See Rodriguez-Matamoras v. INS, 86 F.3d 158, 161 (9th Cir. 1996)(stating that the BIA abused its discretion by failing to provide an explanation "sufficient to enable .... A reviewing court to see that the [BIA] has heard, considered, and decided" the matter of humanitarian asylum). Since the Immigration Judge and the Board altogether failed to address whether the level of persecution was sufficient to merit a grant of asylum for humanitarian reasons, the Third Circuit should have remanded the case for a determination of whether Petitioner established compelling reasons for being unwilling to return to Colombia arising out of the severity of her past persecution.

CONCLUSION

In light of the foregoing, the decision of the Third Circuit must be reversed, recalled, or set aside, on the grounds that it is not in conformity with above-cited provisions of law, and is not supported by evidence on the record, and to pray that this Hon. Court grant certiorari in this case.

EPHRAIM TAHIR MELLA, ESQ.
Attorney for Petitioner
1814 Callowhill Street, First Floor
Philadelphia, PA 19130
Tel. (215) 640-9770

APPENDIX A
Order of the United States Court of Appeals for the Third Circuit Denying Panel Rehearing,
Dated February 10, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4712

MARIA FANNY RODRIGUEZ-REALPE,
Petitioner,

v.

JOHN ASHCROFT, ATTORNEY
GENERAL OF THE UNITED STATES.
Respondent.

SUR PETITION FOR REHEARING EN BANC

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, Circuit Judges, and BUCKWALTER, District Judge[1]

[1] Judge Ronald L. Buckwalter's vote is limited to panel rehearing.

The petition for rehearing on behalf of Petitioner in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby DENIED.

IT IS SO ORDERED.

By the Court,
/s/ Theodore A. McKee

APPENDIX B
Decision of the United States Court of Appeals for the Third Circuit,
Dated December 16, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4712

MARIA FANNY RODRIGUEZ-REALPE,
Petitioner,

v.

JOHN ASHCROFT, ATTORNEY
GENERAL OF THE UNITED STATES.

On Petition for Review from the Board of Immigration Appeals
Agency No. A79-087-296

Submitted under Third Circuit LAR 34.1(a): November 16, 2004

Before : MCKEE and CHERTOFF, Circuit Judges, and
BUCKWALTER,[1] Senior District Judge

JUDGMENT

This cause came on to be considered on the record from the Board of Immigration Appeals and was submitted under Third Circuit LAR 34.1(a) on November 16, 2004.

On consideration whereof, it is now here ORDERED and ADJUDGED by this Court that the petition for review of the decision and order of the Board of Immigration Appeals entered November 13, 2003, be and the same is hereby AFFIRMED.

All of the above in accordance with the opinion of this Court.

No costs.

Attest:

ORIGINAL SIGNED
Acting Clerk

---

[1] Hon. Ronald Buckwalter, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4712

MARIA FANNY RODRIGUEZ-REALPE,
Petitioner,

v.

JOHN ASHCROFT, ATTORNEY
GENERAL OF THE UNITED STATES.

On Petition for Review from the Board of Immigration Appeals
Agency No. A79-087-296

Submitted under Third Circuit LAR 34.1(a): November 16, 2004
Before : MCKEE and CHERTOFF, Circuit Judges, and BUCKWALTER, Senior District Judge
(Filed December 16, 2004)

OPINION

CHERTOFF, Circuit Judge.

Maria Fanny Rodriguez-Realpe seeks review of the final order of the Board of Immigration Appeals (BIA) denying withholding of removal and protection under Article 3 of the Convention Against Torture.

A.

Rodriguez-Realpe, a citizen of Colombia, entered the United States on March 11, 2000 on a visitor visa that extended until September 10, 2000. In November 2001, she received a Notice to Appear for removal proceedings. She then filed the present application for withholding of removal and for protection under the Convention Against Torture (CAT), asserting that she will face persecution for her political opinion if she returns to Colombia. She bases her claim on telephone calls that she received in late 1998 and early 1999 regarding her active support of Conservative Party candidate Dr. Daria Arisa Landonio and his nutritional goals during the 1998 election campaign. Rodriguez-Realpe testified that the telephone calls came from the same person, that the caller identified himself as a member of the Revolutionary Armed Forces of Colombia (FARC), and that he "threatened me that I had to leave the .... place. They even threatened me with my life," (R.98), because "I was part of a group that was .... Political, and they were enemies of that group, (R.97). She believes she would still be at risk if she returned because two news articles from May 2004 report that "FARC shows no sign of relenting" in "carrying out attacks across the country and digging in for the long haul in their fight to take power." (Pet'r Reply Br.10.)[1]

[1] On June 15, 2004, Rodriguez-Realpe filed a motion for leave to expand the record with a supplemental appendix consisting of two new stories which appear at pages 8 to 11 of her Reply Brief. This Court will grant the motion and consider the articles for purposes of this appeal.

After hearing testimony from Rodriguez-Realpe, an Immigration Judge (IJ) denied her application for withholding of removal and for protection under CAT. The decision was affirmed without opinion by the BIA pursuant to 8 C.F.R. § 1003.1((e)(4). This appeal followed.

B.

Rodriguez-Realpe seeks withholding of removal pursuant to 8 U.S.C. § 1253(h) on the basis of her political opinion. To qualify, she must establish that "it is more likely than not" that she "would be subject to persecution" because of her political opinion should she return to Colombia. See INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987)(quoting INS v. Stevic, 467 U.S. 407, 429-30(1984)). This Court reviews the determination of the BIA that she did not establish this "clear probability" of persecution under the substantial evidence standard, meaning that the court will affirm the BIA's finding "unless the evidence not only supports a contrary conclusion, but compels it." Zubeda v. Ashcroft, 333 F.3d 463, 471 (3d cir. 2003)) quoting Abdille v. Ashcroft, 242 F.3d 477, 484 (3d Cir. 2001)).

We will affirm the BIA decision because the record does not reveal a "clear probability" of future persecution based on the 1998-1999 telephone calls. First, the IJ reasonably concluded that the petitioner "tolerate[d] the calls for years" while she was in Colombia (App.7). She never contacted the police, changed her telephone

number, disconnected her phone, and she did not accept the protection offered to her by Dr. Arisa (R.99.) Second, the caller never followed through with the threats. Rodriguez-Realpe maintained her Cali, Colombia residence and vegetarian restaurant for over one year after the phone calls ended, but "[n]o one came to [her] home, no one came to her lectures, no one seems to have altered any of [her] property, no one seems to have threatened [her] in person, no one seems to have taken any action against [her] family, and no one seems to have followed [her] around." (App.6.) She never tried to relocate within Colombia. Instead, she sold her restaurant one month before she left the country for the United States in 2000, to be joined there by her husband and children two months later.

The record thus supports the BIA's conclusion that Rodriguez-Realpe's behavior indicated that she made "slow and steady plans to leave for the United States," rather than leaving due to persecution that would resume if she returned to Colombia. (App.7.) The Court will affirm the BIA decision, and deny this petition for review.[2]

[2] Though the petitioner has not included the CAT determination in her issues on appeal, it is clear that she would not be entitled to relief under CAT because she has not presented, as required, objective evidence showing that "it is more likely than not that ... she would be tortured if removed to [Colombia]." Sevojan v. Ashcroft, 290 F. 3d 166, 174-175(3d Cir. 2002)(quotation marks omitted.)

APPENDIX C
Decision of the Board of Immigration Appeals,
Dated November 13, 2003

US Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041
File : A79-087-296 – NEWARK Date : NOV. 13, 2003

In re: RODRIGUEZ-REALPE, MARIA FANNY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mella, Tahir, Esq.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c),(f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

ORIGINAL SIGNED
FOR THE BOARD

APPENDIX D
Decision of the Immigration Court,
Dated August 16, 2002

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Newark, New Jersey

File No. : A 79 087 296 August 16, 2002

In the Matter of)
)
MARIA FANNY)
RODRIGUEZ-REALPE) IN REMOVAL PROCEEDINGS
)
)
Respondent)

CHARGE : Section 237(a)(1)(B) of the Immigration and Nationality Act – remained longer than permitted.

APPLICATIONS : Section 241(b) (3)(a) of the Immigration and Nationality Act – withholding of removal to Colombia.

Withholding of removal to Colombia pursuant to Article 3 of the United Nations Convention Against Torture.

Section 240 B of the Immigration and Nationality Act –Voluntary Departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Tahir Mella, Esq.	District Counsel U.S. INS, Newark, NJ Attn : Todd Witten Asst District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a female, married, native and citizen of Colombia, and, for the record, is an exceptionally pleasant individual who has devoted much of her time to trying to give nutritional advice and cooking advice to peasants and farmers in Colombia to try to improve their lives. The respondent's noble and probably very helpful work is something that the Court considers to be worth mentioning and certainly worthy of great respect.

The Notice to Appear is before the Court as Exhibit No. 1, and its allegations have all be admitted by the respondent's counsel and conceded as true during a hearing on April 20, 2002. The respondent, having been deemed deportable, designated no country of removal. Therefore, the Court designated Colombia. Respondent filed Form I-589, application for asylum (Exhibit 2), and indeed, the application was forwarded to the Department of State by this Court. The letter forwarding the I-589 to the State Department for an advisory opinion has been admitted into evidence as Exhibit No. 3.

It is also noted that the respondent's I-589 constitutes merely an application for withholding of removal. She is time barred from applying for asylum, as the statute would have required that she would have filed the I-589 on or before March 11, 2001, which the respondent missed by more than a year.

The respondent, nevertheless, pursues an application for withholding of removal, and presents evidence including not only her own residence and nationality, and, in fact, a passport not copied for the Court was certainly passed around the courtroom today, and the Court deposes her to say that the Court can easily find that the respondent is, indeed, from Colombia. Secondly, the respondent has presented a statement from Dario Arisa Landonio, someone who is now apparently an alternate member of a chamber of representatives in Colombia, who has explained the respondent's good works in Colombia. The respondent has also provided the Court with an amendment to her I-589 that is a part of what has been admitted into evidence as Exhibit No. 4.

The respondent's claim is that she fears persecution by FARC in Colombia. She fears persecution on account of her political opinion, which is a political opinion supportive of the Conservative Party. She is afraid that should she return to Colombia in the future, there exists a clear likelihood of persecution.

This is not an asylum claim; therefore, the respondent obviously must meet a demanding burden of proof. She must prove that there exists a clear probability, or that it is more likely than not that she would suffer

persecution in Colombia upon return. INS v. Stevic, 467 U.S. 407 (1984); Chang v. INS, 119 F.3d 1055 (3rd Cir. 1997). The respondent, therefore, must meet a very demanding burden of proof here. Her credible testimony is that in 1998, she had already been working hard to teach both cooking and also nutrition to people who were farming certain crops in Colombia where she lived. In fact, the respondent owned her own business and had three employees living apparently near Cali.

The respondent also at the same time gave support to Doctor Arisa's campaign. It is her testimony that the way she supported the campaign, given Doctor Arisa's support for her nutritional counseling programs, was that during the nutritional counseling programs, she would add that the individuals at those meeting should support Doctor Arisa as a candidate for election because he supported her program of nutrition. Therefore, the Court can easily find that the respondent did speak out and identify herself politically with the Conservative Party.

The respondent claims that she began receiving phone calls from one Ricardo Gonzalez. The respondent is not sure, but believes that Ricardo Gonzales identified himself to be from Front 32 of FARC. All the calls she received were from this individual, who she has never met. For some peculiar reason that the Court does not understand, and unexplained by the respondent, she, for some reason, feared danger and feared harm to her from the calls. The calls came repeatedly, not only at work but at home, and she even testified that she somehow got calls

when was giving nutritional lectures as well. All these calls, beginning in late 1998 and throughout the time that she lived in Colombia, yet there was never any follow-up by the caller. No one came to the respondent's home, no one came to the respondent's lectures, no one seems to have altered any of the respondent's property, no one seems to have threatened the respondent in person, no one seems to have taken any action against the respondent's family, and no one seems to have followed the respondent around. In other words, for some peculiar reason, the respondent was afraid of persistent phone calls that were never followed with action.

The respondent testified that she confided in her husband, her employees, and Doctor Arisa about these calls. Doctor Arisa offered the respondent protection, but the respondent declined it. That is additional evidence that the respondent did not take the calls seriously. Additionally, the respondent did not even go to police to complain, and did not even try to change her phone number or, for that matter, just have the phone disconnected. Instead, she decided to tolerate the calls for years. Unlike most refugees in fear, the respondent took her time, and over the course of late 1998 until her departure in March 2000, she made slow and steady plans to leave for the United States. She sold her business. In fact, the sale of the business corresponds close in time to when she finally departed. The business was not sold close in time to when the calls began in late 1998. In fact, the business was not sold until February 2000. And then one month later, the respondent left for the United States, and then two months later, her husband and her children all

joined her. This conduct is completely inconsistent with true refugees, in the opinion of this Court. A true refugee would have up and left. In addition, the respondent never, at any time, attempted to relocate or to take the proceeds from her business and purchase a new business elsewhere in Colombia.

Given her fear of persecution not by the Government, but, indeed, by an organization not part of the government, the respondent would have a clear legal burden of establishing some fear countrywide. See generally Matter of Fuentes, 19 I&N Dec. 658, 663 (BIA 1988). Obviously, the respondent tolerated calls from 1998 until 2000, and yet was never harmed or really bothered other than to have received these calls, calls that the respondent really had the right to just hang up on rather than listen to. Given the fact that the respondent remained in her country without problems, it also gravely militates against any likelihood that she would be harmed upon return.

For example, in Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997), an individual remained in Guatemala living in different areas for more than a year without problems. That individual even moved around to different locations in Guatemala, yet was denied asylum. In this case, where the respondent stayed put without harm and did not seem to take too seriously the calls that she received until she came to be noticed by the Immigration Service here in the United States, this Court finds that her case is even less compelling that the person in C-A-L-.

In other words, again, although this Court has tremendous respect for the wonderful and dignified work

that the respondent did to teach people how to live and how to feed themselves, there are many legal problems with her claim. Although she easily establishes and the Court can easily find that FARC is an organization that the government of Colombia is unable or unwilling to control, and although the Court can easily find that the respondent did express her political opinion even in public in support of the Conservative Party, the favorable aspects of her case end there. She tolerated calls, as the Court has emphasized many times above, for more than a year and what sounds like years, from late 1998 until March 2000, without any alteration at all to her lifestyle. She was offered protection by Doctor Arisa, but declined it evidently because she did not feel in danger. She never went to the police. And then on top of all of that, the respondent slowly, slowly, deliberately sold her business, came to the United States, and then had her family come later. That very slow, deliberate, very calculated sale of her business, is in the opinion of this Court, the death knell to the claim because obviously it shows that the respondent had no great fear and took her time to sell the business. The Court merely concludes that, given the leisurely way in which the respondent eventually sold her business, she obviously waited until she could work the very best deal possible, the Court assumes, because it certainly took her long enough. Therefore, this Court finds that, frankly, the respondent presents little, if any, evidence that there exists a clear likelihood of persecution should she return even to where she was living in Colombia, much less should she locate to some other part of the country. The Court further finds, as a matter of law, that the application for

withholding of removal pursuant to Section 241 (b)(3)(A) of the Immigration and Nationality Act must be denied.

The respondent presents absolutely not a hint of any fear of any public official in Colombia or anyone working with acquiescence of a public official in Colombia. As a matter of law, the respondent presents no evidence of a claim pursuant to the Convention Against Torture. There is no Service opposition to voluntary departure. The respondent is law-abiding. There is no evidence that there is any discretionary factor that would militate against voluntary departure in this case, and the Service is unopposed.

The decision of the Court is as follows :

ORDER

IT IS HEREBY ORDERED that the respondent's application for withholding of removal pursuant to Section 241(b)(3)(a) of the Immigration and Nationality Act, and, in addition, pursuant to Article 3 of the United Nations Convention Against Torture are each denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure is granted without opposition from the Immigration Service, and the respondent is hereby ordered to depart the United States voluntarily and at her own expense on or before October 15, 2002, or any date beyond that as might be provided by the District Director for the Immigration and Naturalization Service, and under such conditions as the District Director might direct.

IT IS FURTHER ORDERED that, as a condition to voluntary departure, the respondent post a bond with the Immigration and Naturalization Service on or before August 23, 2002, a date that cannot be enlarged by the undersigned Immigration Judge as it is a regulatory provision.

IT IS FURTHER ORDERED that should the respondent fail to post said bond, or should the respondent fail to depart the United States when and as required, then without further notice or hearing, the above order granting voluntary departure shall be immediately vacated and withdrawn, and the following order be entered in its stead: IT IS ORDERED that respondent be removed from the United States of America to Colombia based on the charge contained in the Notice to Appear and sustained by the Court.

ANNIE S. GARCY
Immigration Judge